

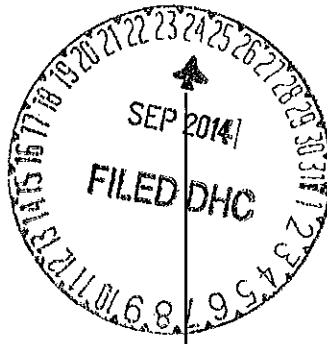
STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR
14 DHC 29

THE NORTH CAROLINA STATE BAR
Plaintiff,

v.

CLARKE K. WITTSTRUCK
Defendant.



Response

The defendant, responding to the allegations of the plaintiff, says:

1. The allegations in ¶1 of the plaintiff's complaint are admitted.
2. The allegations in ¶2 of the plaintiff's complaint are admitted.
3. The allegations in ¶3 of the plaintiff's complaint are admitted.
4. The allegations in ¶4 of the plaintiff's complaint are admitted.
5. The allegations in ¶5 of the plaintiff's complaint are admitted.

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6. The allegations in ¶6 of the plaintiff's complaint are denied. I have no recollection of this action. Mr. Moore was informed in January of 2012 that his wife had hired an attorney and all pleadings were timely sent to Mr. Moore.

7. The allegations in ¶7 of the plaintiff's complaint are admitted in part and denied in part. This is not how it happened. There were several phone calls between myself and Mr. Moore about the case because his wife wanted spousal support. The opposing attorney made a motion to dismiss the case in January of 2012 and Mr. Moore was informed of this action. Ultimately in March of 2012 Mr. Moore agreed to pay his spouse \$400/month until she reached the age of 65 and that the retirements accounts with Ecusta and Eaton would be divided equally.

8. The allegations in ¶8 of the plaintiff's complaint are admitted in part and denied in part. My file indicates I sent an email to Mr. Moore on July 18, 2012 with copies of the proposed qualified domestic relations order (QDRO). I believe this was sent to Mr. Moore about the time it was drafted not a month later. However Mr. Moore did quickly approve the drafts.

9. The allegations in ¶9 of the plaintiff's complaint are admitted in part and denied in part. I sent drafts of the QDROs to the opposing attorney in July, shortly after Mr. Moore had approved the drafts and I did talk to Mr. Moore about the status of case.

10. The allegations in ¶10 of the plaintiff's complaint are admitted in part and denied in part. I may have spoken with Mr. Moore on the dates in question, but I do not recall the exact dates. What I told Mr. Moore was the drafts of the QDROs had been sent by the opposing attorney to the companies in question for approval before processing but I had no control over the timetable for this approval or the timetable of the opposing attorney. The QDROs were for the benefit of the opposing attorney's client so I was willing to work on his schedule.

11. The allegations in ¶11 of the plaintiff's complaint are admitted in part and denied in part. I have looked for these emails and cannot find any record in my Outlook system. I do admit Mr. Moore was checking back on the status of the QDROs and my response was the same: the opposing attorney is getting the QDROs approved.

Grounds for Relief:

- a). I admit I failed to act with reasonable diligence and promptness but I never told Mr. Moore a falsehood.
- b). I admit I failed to promptly comply with reasonable requests for information, however at every step I told Mr. Moore the processing of the QDROs was something his wife's attorney was handling and I did not control the timetable.

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12. The allegations in ¶12 of the plaintiff's complaint have been answered.

13. The allegations in ¶13 of the plaintiff's complaint are admitted.

14. The allegations in ¶14 of the plaintiff's complaint are admitted with an explanation: Ms. Ray's funds came to me via a credit card purchase, my credit card system at the time went directly into my general operating account. I have now corrected this and my credit card system goes into a separation account and then I transfer the funds to my general operating account. However, it is important to know that Ms. Ray, as the payor of the credit card has an absolute right to withdraw these funds at any time up to 90 days from the date of purchase. The credit card company will immediately withdraw the funds and hold them in escrow if there is a dispute. As a result all credit card purchases for traffic matters are essentially advances made by the attorney for the benefit of the client since the funds can be withdrawn. I have now changed my system so I do not handle client funds by credit card for this reason.

15. The allegations in ¶15 of the plaintiff's complaint are admitted with an explanation: most of my clients pay the court system directly upon the entry of the traffic judgment. I send them the bill and they pay the court system directly and the receipt is sent to them. I ask the clients to notify me so I can check the AOC computer to insure the plea was entered correctly by the court. This case got mixup as a direct pay matter. When I realize the error I went and paid the cost bill. The failure to comply was stricken.

16. The allegations in ¶16 of the plaintiff's complaint are denied. When I process a traffic ticket my system sends the client an automated confirmation of this action. I do not recall calls from Ms. Ray and I have looked and cannot locate any inquires by email, which was how the case came into my office and always my requested type of inquiry, for accountability amount other things.

17. The allegations in ¶17 of the plaintiff's complaint are admitted in part and denied in part. A failure to comply was entered but then set aside by the court.

18. The allegations in ¶18 of the plaintiff's complaint are admitted upon information and belief. I do not recall when the petition was filed.

19. The allegations in ¶19 of the plaintiff's complaint are admitted with an explanation: I did not respond within 15 day of the FDRP notice but I did respond on September 30, 2013, when my failure to respond was brought to my attention by the St. Bar.

20. The allegations in ¶20 of the plaintiff's complaint are admitted in part and denied in part. I did pay the costs on April 5, 2013 and I notified Ms. Ray shortly thereafter. It is true I did not timely pay the costs but this was a mistake I corrected within 30 days.

Grounds for Relief:

- a). Denied. This case came into my office on 2/5/13. I plea was entered on 3/4/13. The costs were paid on 4/5/13. Ms. Ray was notified when the costs were paid.

b). Denied. I admit I failed to deposit Ms. Ray's funds in a trust account; however see ¶14 for a response.

c). Denied. I moved Ms. Ray's case very quickly. The failure to comply was an error and was stricken by the court.

d). Admitted in part and denied in part. I did fail to respond timely but I did then respond and participated in good faith.

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21. The allegations in ¶21 of the plaintiff's complaint have been answered.

22. The allegations in ¶22 of the plaintiff's complaint are admitted with clarification: My records indicate my file was opened on September 21, 2012. Ms. Larson was charged with driving 93mph in a 65mph zone.

23. The allegations in ¶23 of the plaintiff's complaint are denied with an explanation: I spoke to Ms. Larson on the phone prior to her hiring me. At that time I told her I could get the case continued. I was not hired until several days after this phone call. When Ms. Larson emailed me I contacted the District Attorney's office for Polk County and, on September 27, 2012 the DA re-set the case for October 10, 2012. I notified Ms. Larson about the new court date.

24. The allegations in ¶24 of the plaintiff's complaint are denied with an explanation: I am not sure I was hired prior to September 19, 2012. I did speak with Ms. Larson before then. I contacted the District Attorney and had the case re-set for October 10, 2012. I was told by the DA any FTA and/or OFA would be stricken.

25. The allegations in ¶25 of the plaintiff's complaint are admitted upon information and belief. I do not know whether this is true.

26. The allegations in ¶26 of the plaintiff's complaint are admitted upon information and belief. I do not know whether this is true.

27. The allegations in ¶27 of the plaintiff's complaint are admitted.

28. The allegations in ¶28 of the plaintiff's complaint are admitted.

29. The allegations in ¶29 of the plaintiff's complaint are admitted.

Grounds for Relief:

a). Denied. In reviewing my file I am not certain Ms. Larson hired me prior to September 21, 2012, after the initial court date.

b). Denied. When I was informed that an FTA has been entered I immediately placed the case on the next Polk County docket. Polk County has court one (1) time per week on Wednesdays. At the November 14, 2012 I had the FTA stricken, entered the plea and notified Ms. Larson.

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30. The allegations in ¶30 of the plaintiff's complaint have been answered.

31. The allegations in ¶31 of the plaintiff's complaint are admitted.

32. The allegations in ¶32 of the plaintiff's complaint are admitted with explanation. Please see ¶14 above.

33. The allegations in ¶33 of the plaintiff's complaint are admitted with an explanation. This case was initially continued from August 23, 2012 to September 13, 2012. It was not properly added back to my calendar on September 13, 2012 due to a computer malfunction. When I went to court on September 13, 2012, this case was not on my list for that day. This is my mistake and I now have a better calendaring system in place. Also in every correspondence with clients I suggest they contact me by email if they do not hear from me within 5 days after any court date. I do this so cases will not get lost. Here Mr. Grawe was not notified because my system was not properly updated. I would like to point out that I lost my paralegal of 17 years in August of 2012. I was forced to close my office due to changes made after my heart by-pass surgery in December of 2011. I believe that is why this case was lost.

34. The allegations in ¶34 of the plaintiff's complaint are admitted in part and denied in part. An FTA was entered and I was notified of this by Mr. Grawe when he received a letter from DMV.

35. The allegations in ¶35 of the plaintiff's complaint are admitted upon information and belief. Mr. Grawe notified me about the FTA so I assume he received the letter.

36. The allegations in ¶36 of the plaintiff's complaint are admitted upon information and belief. I later spoke to Mr. Grawe and this is what he told me.

37. The allegations in ¶37 of the plaintiff's complaint are admitted upon information and belief.

38. The allegations in ¶38 of the plaintiff's complaint are admitted.

39. The allegations in ¶39 of the plaintiff's complaint are denied with an explanation. I did not respond in a timely manner. I was informed I was late with a response to the St. Bar and I filed a response on September 30, 2012. Once I realized this situation I called Mr. Grawe and apologized and I refunded Mr. Grawe's money on September 30, 2012.

Grounds for Relief:

a). I admit this.

b). I admit this. I made a calendaring mistake in September of 2013 which was not brought to my attention by the client until May of 2013.

c). Denied. I admit the calendaring mistake; however as a result I did not know about the FTA until informed by Mr. Grawe 8 months later during.

d). Denied. I was late in filing my response but thereafter I did participate in good faith with the fee dispute resolution process.

40. The allegations in ¶40 of the plaintiff's complaint have been answered.

41. The allegations in ¶41 of the plaintiff's complaint are admitted.

42. The allegations in ¶42 of the plaintiff's complaint are denied with an explanation. I ultimately negotiated and prepared a fully separation agreement for Ms. Fisher which her husband was ready to sign. I had previously fully refunded Ms. Fisher's money and was doing this pro bono. I did initially set the matter aside when I received conflicting signals from Ms. Fisher about a possible reconciliation.

43. The allegations in ¶43 of the plaintiff's complaint are admitted upon information and belief. Ms. Fisher did request her funds back and I paid them back but continued to work on the case.

44. The allegations in ¶44 of the plaintiff's complaint are denied. I refunded Ms. Fisher's funds in full.
45. The allegations in ¶45 of the plaintiff's complaint are admitted.
46. The allegations in ¶46 of the plaintiff's complaint are admitted upon information and belief.
47. The allegations in ¶47 of the plaintiff's complaint are admitted.
48. The allegations in ¶48 of the plaintiff's complaint are denied with an explanation. I did not timely file a response but on October 1, 2012 I filed a response.

Grounds for Relief:

a). Denied. During this time the parties engaged in attempts at reconciliation. I meet several times with Mr. Fisher but held off forcing a legal act because my client did not immediately want this (she later did) and forcing a legal action might jeopardize the payments Ms. Fisher was receiving which Mr. Fisher, because of his age, could, in my opinion, stop at any time because the court would not require him to work since he was older than 65 years of age.

b). Admitted in part and denied in part. Ms. Fisher will sometimes send 10 text messages at a time. I always answered as many as I could. She was also often changing her mind and my counsel was to not push things because the court would not be as generous to her as her husband was being and if she wanted funds from the retirement accounts he would do this and pay the associated taxes. So there was plenty of reasons to go slowly with this case.

c). Admitted in part. I was late in responding; however thereafter I did participate in good faith.

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49. The allegations in ¶49 of the plaintiff's complaint have been answered.
50. The allegations in ¶50 of the plaintiff's complaint are admitted.
51. The allegations in ¶51 of the plaintiff's complaint admitted.
52. The allegations in ¶52 of the plaintiff's complaint are admitted upon information and belief. I'm not sure when this would have occurred because a missed court date on May 22, 2013 and corrected on May 24, 2013 would not have made the AOC computer until May 24, 2013. But I did not see the alleged email.
53. The allegations in ¶53 of the plaintiff's complaint are admitted upon information and belief.
54. The allegations in ¶54 of the plaintiff's complaint are admitted. I corrected this error two (2) days later on July 17, 2013. I had the called and failed set aside and a new court date set.
55. The allegations in ¶55 of the plaintiff's complaint are admitted.
56. The allegations in ¶56 of the plaintiff's complaint are admitted upon information and belief.
57. The allegations in ¶57 of the plaintiff's complaint are admitted upon information and belief.
58. The allegations in ¶58 of the plaintiff's complaint are admitted.
59. The allegations in ¶59 of the plaintiff's complaint are admitted upon information and belief.

60. The allegations in ¶60 of the plaintiff's complaint are admitted upon information and belief. I have no recollection of this letter.

61. The allegations in ¶61 of the plaintiff's complaint are admitted. In reviewing this case and pulling Mr. Bell's information from ACIS I believe I made a mistake in my original statement to the Bar. I apologize for this. I do not know how this happened but believe I confused Mr. Bell's case with another Henderson County case. But in reviewing the ACIS statement it is for a fine and speed amount which I do not normally plead clients to thus I think it was a pro se action.

Grounds for Relief:

- a). Admitted.
- b). Admitted. Mr. Bell repaired the situation 2 days later before the error would have been in the AOC computer.
- c). Admitted.
- d). Admitted. This was a calendaring error I corrected 2 days later.
- e). Admitted. This statement was made in error not in calculation.
- f). Admitted. I have no recollection of this letter.

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62. The allegations in ¶62 of the plaintiff's complaint have been answered.

63. The allegations in ¶63 of the plaintiff's complaint are admitted upon information and belief.

64. The allegations in ¶64 of the plaintiff's complaint are admitted.

65. The allegations in ¶65 of the plaintiff's complaint are admitted upon information and belief.

66. The allegations in ¶66 of the plaintiff's complaint are admitted.

67. The allegations in ¶67 of the plaintiff's complaint are admitted.

68. The allegations in ¶68 of the plaintiff's complaint are admitted upon information and belief.

69. The allegations in ¶69 of the plaintiff's complaint are admitted.

70. The allegations in ¶70 of the plaintiff's complaint are admitted.

71. The allegations in ¶71 of the plaintiff's complaint are admitted.

Grounds for Relief:

- a). Admitted.
- b). Admitted.
- c). Admitted.

72. The allegations in ¶72 of the plaintiff's complaint have been answered.

73. The allegations in ¶73 of the plaintiff's complaint are admitted.

74. The allegations in ¶74 of the plaintiff's complaint are admitted upon information and belief. I do not recall this but it is consistent with what I tell divorce clients.

75. The allegations in ¶75 of the plaintiff's complaint are admitted.

76. The allegations in ¶76 of the plaintiff's complaint are admitted upon information and belief.

77. The allegations in ¶77 of the plaintiff's complaint are admitted upon information and belief.

78. The allegations in ¶78 of the plaintiff's complaint are admitted.

79. The allegations in ¶79 of the plaintiff's complaint are admitted.

80. The allegations in ¶80 of the plaintiff's complaint are admitted with an explanation: I vacated my law office in early October of 2012. I issued a forwarding with the US. Postal Service but continued to check my old mailbox regularly while my office was for sale. My new address was a Post Office Box. I failed to notify the St. Bar of the new address and I believe the mailing in question was returned when it was not forwarded correctly.

81. The allegations in ¶81 of the plaintiff's complaint are admitted.

82. The allegations in ¶82 of the plaintiff's complaint are admitted.

83. The allegations in ¶83 of the plaintiff's complaint are admitted.

84. The allegations in ¶84 of the plaintiff's complaint are admitted.

85. The allegations in ¶85 of the plaintiff's complaint are admitted.

86. The allegations in ¶86 of the plaintiff's complaint are admitted.

87. The allegations in ¶87 of the plaintiff's complaint are admitted with an explanation: I made the statement relying upon my office notes which I now find were incorrect. I did not make the statement to mislead the St. Bar.

88. The allegations in ¶88 of the plaintiff's complaint are admitted.

89. The allegations in ¶89 of the plaintiff's complaint are admitted, again the statement was in error due to my case notes not made to mislead the St. Bar.

90. The allegations in ¶90 of the plaintiff's complaint are admitted.

91. The allegations in ¶91 of the plaintiff's complaint are admitted.

92. The allegations in ¶92 of the plaintiff's complaint are admitted.

93. The allegations in ¶93 of the plaintiff's complaint are admitted.

Grounds for Relief:

- a). Admitted.
- b). Admitted.
- c). Admitted.
- d). Admitted.
- e). Denied. The statement was made in error and as a knowing misrepresentation.
- f). Admitted.

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- 94. The allegations in ¶94 of the plaintiff's complaint have been answered.
- 95. The allegations in ¶95 of the plaintiff's complaint are admitted.
- 96. The allegations in ¶96 of the plaintiff's complaint are admitted.
- 97. The allegations in ¶97 of the plaintiff's complaint are admitted upon information and belief.
- 98. The allegations in ¶98 of the plaintiff's complaint are admitted.
- 99. The allegations in ¶99 of the plaintiff's complaint are admitted upon information and belief.
- 100. The allegations in ¶100 of the plaintiff's complaint are admitted.

101. The allegations in ¶101 of the plaintiff's complaint are admitted in part and denied in part. I responded late to the St. Bar.

Grounds for Relief:

- a). Admitted.
- b). Admitted.
- c). Admitted.

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- 102. The allegations in ¶102 of the plaintiff's complaint have been answered.
- 103. The allegations in ¶103 of the plaintiff's complaint are admitted.

104. The allegations in ¶104 of the plaintiff's complaint are admitted with an explanation: there were 2 tickets and I handled the first case to come up, the 2013 case with the additional seat belt charge, sent the cost bill to the client who, I believe paid it. Upon sending the bill to the client I accidentally closed out the electronic case file and thus did not continue the 2012 case when it came up on the calendar.

- 105. The allegations in ¶105 of the plaintiff's complaint are admitted.
- 106. The allegations in ¶106 of the plaintiff's complaint are admitted upon information and belief.

107. The allegations in ¶107 of the plaintiff's complaint are admitted upon information and belief. I also refunded Ms. Gardiner's money for the 2012 case.

108. The allegations in ¶108 of the plaintiff's complaint are admitted.

109. The allegations in ¶109 of the plaintiff's complaint are admitted in part and denied in part. I responded to the inquiry late.

Grounds for Relief:

a). Admitted.

b). Admitted.

c). Admitted.

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110. The allegations in ¶110 of the plaintiff's complaint have been answered.

111. The allegations in ¶111 of the plaintiff's complaint are admitted.

112. The allegations in ¶112 of the plaintiff's complaint are admitted.

113. The allegations in ¶113 of the plaintiff's complaint are denied. This conversation did not take place.

114. The allegations in ¶114 of the plaintiff's complaint are admitted.

115. The allegations in ¶115 of the plaintiff's complaint are admitted upon information and belief.

116. The allegations in ¶116 of the plaintiff's complaint are admitted.

117. The allegations in ¶117 of the plaintiff's complaint are admitted with an explanation: this case was mistakenly marked as a client pay case and the plea was entered and the cost bill set up to be sent to the client. The cost bill was not sent and a failure to comply (FTC) was issued alerting the client who paid the cost bill and the FTC. I then reimbursed the client for the full cost bill and the FTC cost.

118. The allegations in ¶118 of the plaintiff's complaint are admitted.

119. The allegations in ¶119 of the plaintiff's complaint are admitted upon information and belief.

120. The allegations in ¶120 of the plaintiff's complaint are admitted upon information and belief.

121. The allegations in ¶121 of the plaintiff's complaint are admitted.

122. The allegations in ¶122 of the plaintiff's complaint are admitted.

123. The allegations in ¶123 of the plaintiff's complaint are admitted in part and denied in part. I responded to the inquiry late.

Grounds for Relief:

a). Admitted.

- b). Admitted.
- c). Admitted.
- d). Denied.
- e). Admitted.

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Having Answered the Plaintiff's allegations and to the extent admissible, I wish to make a statement to the Bar:

I have been a practicing attorney since 1986. I work very hard for a large number of clients. I have been in solo practice since 1989.

In December of 2011 I had open heart surgery. I was out of the office for almost 3 months. I had 2 employees at the time and I paid both out of my pocket. My paralegal had been with me since 1995. Since my surgery I have had diminished memory capacity. Over the past 2 years I have worked to set up computer programs to assist me with this diminished capacity. A problem with once having a very good memory and now having diminished memory is the self realization: if you are used to relying upon your good memory you do not realize you are now missing things day to day. So you have to set up new structures and routines to assist your diminished abilities. I have tried to do this with computers with increasing success.

Upon returning to work in late February I wanted to restructure my law practice to reduce stress but I did not want to force changes on my employees until they could find other suitable employment. This required some balancing - working to simplify my office and take in fewer cases while still taking on sufficient volume to pay my staff. So when my last employee left in August of 2012 while I was aiming to simplify I was also dealing with a larger case load than I might have otherwise taken on and too large a case load for one person to handle properly.

I closed my office in late September of 2012. I moved my office to my home without staff. I was also frantically writing computer code (I have always written many of my programs) to allow my computer to help me manage my case load and not getting much sleep. I let entire areas of my practice go. For example, prior to my surgery I handled 2-3 bankruptcies and 2-3 Wills each week. I no longer do either type of legal work. Instead I now mainly do simple District Court criminal work and uncontested divorces. There are occasional domestic cases added to this but mainly I have simplified to these two areas. These areas offered limited client contact which helps with a home office and a standardization which offers advantages in computerized case management. The cases I handle now are similar cases which lend themselves to computerization. I actually now handle 4-6 new cases each day but since the cases are standardized my computer does a lot of the work.

And I've made a number of changes. For one I no longer handle client funds only legal fees. If a client sends client money via a credit card I immediately refund the transaction. Instead I have the client pay the court directly. And on every email my clients receive I include language that if they do not hear from me within 5 days of any court date something is wrong and they should contact me by email so there will be a record. And I have programmed my phone system to recognize existing client calls and sort them for priority in my email system (all my messages now appear as emails) for a better response. And all cases are automatically uploaded to a cloud based storage system (I use DropBox) so I can access the client file from any device anywhere. This are all positive steps but do not address the harm I have caused to the clients in this complaint.

Most of the cases complained of in this complaint date from the end of 2012 to the fall of 2013. During this time I was struggling to finish older cases taken on while I still had staff, move to a new location, and change to a paperless folderless system of electronic case management. I was working 7 days a week non-stop. I was not getting enough rest. And obviously I was making mistakes.

But I was also handling many many cases competently. In 2013 I ended up processing almost 400 divorces

by myself. I averaged 15 to 20 traffic tickets each week or around 700 to 800 cases during the year. I did this solo without staff from my home. This complaint represents failures but there were many many more success stories.

Here each case is a failure in a different manner but more precisely a system processing failure. When you measure these against all my other cases statistically they take on a different look. But they are still failures. For your purposes - not knowing much about me other than the complaints at hand - these failures look like a collapse of sorts, by gross negligence or indifference. They are not; all are embarrassing self inflicted errors of memory loss and attention, but not a collapse.

What you have to decide is whether I am a bad and indifferent person and a threat to those I assist with legal problems or whether am I an overworked, sleep deprived and memory challenged (as a result of heart surgery and sleep deprivation) decent lawyer creatively handling a high volume of simple cases while working through a difficult time period and doing better.

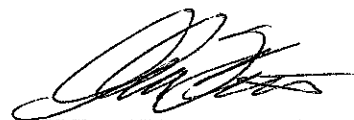
I submit I am a good lawyer and a good person and I am doing things in my now limited legal sphere which are innovative and good for my clients. I don't smoke, drink, use drugs, eat red meat and do not have mental issues which might be cause for sympathy in some circles of the Bar. I work hard and I get better at processing cases. Ask some of the lawyers I work with. Ask the Clerk's staff in Buncombe. Everyone would tell you it has been rough since my surgery and I've tried to do too much too fast but none will tell you I do not care about my clients.

I failed in these cases and realize I must be punished for these failures. But I will get back up and I will do better in the next case. This is what I do. I get back up and I try to do better. But I truly believe if you take a step back and look at everything I do it may mitigate these failures somewhat.

I do many many good things for a lot of clients and I do not want to lose my law license. I am willing to travel to Raleigh to meet with anyone at anytime to seek a informal resolution and to accept the punishment of the court for actions I have inflicted upon myself without court drama and to keep expenses down. My hope is that the court may allow some type of mediated settlement in this matter with, perhaps a probationary period with guidelines for dealing with future cases. But I know each of these cases represents a failure and I do not want to waste anyone's time arguing otherwise. The only issues or denials are minor clarifications but not the main thrust of the action. These cases are all failures on my part where I have harmed clients. I must accept responsibility for my actions.

CERTIFICATE OF SERVICE: I certify that on this date a copy of the foregoing was served upon each party or counsel of record by delivery or mailing in the manner prescribed by the applicable Rules of Procedure.

This the 28 day of September, 2014.



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